No. 21,860

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BLADE-TRIBUNE PUBLISHING COMPANY, RESPONDENT

SAN DIEGO TYPOGRAPHICAL UNION, LOCAL 221, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, INTERVENOR

On Petition for Enforcement of an Order of the National Labor Relations Board

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RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent is submitting the following statement of facts which includes certain facts found by the Trial Examiner and adopted by the National Labor Relations Board (hereinafter "Board") or uncontradicted in the record which were not included in the statement of facts in Petitioner's Brief.

Respondent is a California corporation having its principal place of business in Oceanside, California, where it publishes and distributes a daily newspaper.

From time to time during the several years preceding 1965, Carl Mason, President of San Diego Typographical Union, Local 221 (hereinafter "Union"), had been in

Respondent's place of business attempting to solicit membership in the Union. (Tr. 353)* However, Mason became ill in July 1964, and ceased his organizational activities among Respondent's employees until early in 1965. (Tr. 79)

On or about January 15,** Mason sent a telegram and identical letter to Respondent's publisher, Braden, which stated that the Union represented a majority of employees in Respondent's mechanical departments and that the Union was prepared to meet for negotiations. (Tr. 11, 12, 80; G. C. Exh. 22) The telegram contained no offer to prove the claim of majority representation.

Braden first saw the telegram a few days later and, after conferring with his attorney, replied on or about January 20. (Tr. 12) The reply expressed Braden's doubts that the Union represented a majority of employees in any appropriate collective bargaining unit. It also suggested that the questions of majority status and appropriate unit be resolved through the National Labor Relations Board. (G. C. Exh. 2)

From on or about January 20 to on or about February 4, Braden interviewed thirteen of his employees to ascertain whether any of them had, in fact, authorized the Union to represent them. (Tr. 34, 325-334)

Before each interview, Braden showed or told the employees of the Union's January 15 telegram and explained that he wished to find out if it was correct. He also explained that they need not answer any questions, nor fear any reprisals if they did. (Tr. 325-326)

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* References designated "Tr." are to the reporter's transcript of testimony. References designated "G.C. Exh." and "R. Exh." are to exhibits of the General Counsel and Respondent, respectively. References designated "R." are to volume 1 of the record herein.

**All dates refer to 1965 unless otherwise designated.

Braden was advised by a majority of the employees in the mechanical departments, including a majority in the composing room, that they had not designated or did not wish the Union to act as their collective bargaining representative. (Tr. 62, 139, 141, 192, 198, 213, 220, 262, 269, 270, 326, 331-334)

On or about February 4, the Union's attorney wrote to Braden and offered for the first time to prove that the Union represented a majority of Respondent's employees in a combined mechanical department unit. (G. C. Exh. 3)

On or about February 11, Respondent's attorney replied as follows:

> " . . . prior to the receipt of your letter of February 4, 1965, an investigation was conducted for the purpose of determining whether or not Mr. Mason's claim that the employees in the mechanical departments of the Blade-Tribune Publishing Company desired San Diego Typographical Union Local 221 to represent them in collective bargaining was correct. We are advised that as a result of such investigation the Blade-Tribune Publishing Company genuinely doubts that such Union does represent a majority of its mechanical department employees or any other employees in an appropriate collective bargaining unit . . .
>
> We suggest that these questions of appropriateness of a bargaining unit and majority status of the San Diego Typographical Union Local 221 be decided by the National Labor Relations Board in a representation proceeding. . . ." (G. C. Exh. 4)

The Union did not reply for almost a month. Then, on or about March 9, the Union's attorney wrote Respondent's attorney:

"Please be advised that ITU Local 221 will consent to an expeditious procedure for determining its majority status in the traditional composing room unit. . . ." (G. C. Exh. 5)

On March 15, Respondent's attorney replied:

". . . the Union is apparently willing to consent to an expedited procedure for determining the Union's majority status with respect to employees in the composing room unit only. This represents a departure from the Union's original position that the appropriate unit consisted of all employees in the mechanical departments . . . the Company has a good faith doubt that Local 221 represents a majority of the composing room employees and . . . the Company has reason to doubt the validity of any authorization cards obtained by Local 221. . . . [T]he Company is willing to enter into a consent election agreement under the rules of the National Labor Relations Board for a representation election among the employees in the appropriate collective bargaining unit." (G. C. Exh. 6)

The Union did not reply. On or about March 22, Respondent filed an RM Petition with the Twenty-First Region of the Board. (Tr. 340; R. Exh. 2) Thereafter, on April 6, Respondent and the Union entered into an Agreement for Consent Election. (R. Exh. 3)

During the month before the election, Braden took most of Respondent's employees to lunch, in groups ranging from one to four. (Tr. 36, 345)

The election, which was held on May 5, resulted in a vote of 15 to 8 against representation by the Union. (Tr. 20)

Employee Agneta quit Respondent's employ on or about May 7. (Tr. 166-167)

Thereafter, the election was set aside on the basis of a timely objection filed by the Union.* (G. C. Exh. 7) On June 28, charges alleging violations of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (hereinafter "Act"), 29 U.S.C. §§151-168, were filed and duly served. [G. C. Exh. 1(a), 1(b)] Subsequently, that portion of the foregoing charges alleging a violation toward employee Agneta was withdrawn by the Union. (Tr. 131)

On October 8, the Complaint herein issued alleging violations of Section 8(a)(1) and (5) of the Act. [G. C. Exh. 1(c)] At the hearing before the Trial Examiner, amendment of the Complaint to allege a violation toward Agneta was allowed over Respondent's objection that such amendment was barred by Section 10(b) of the Act. (Tr. 130-133)

QUESTIONS PRESENTED

1. Is there substantial evidence in the record to support a finding that on January 15, 1965, the Union represented a majority of Respondent's employees?

2. Is there substantial evidence in the record to support the findings as to Respondent's unlawful course of conduct between the time of the Union's demand and the election?

3. Should a bargaining order be enforced under circumstances where, at best, only minimal Section 8(a)(1) violations have occurred?

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* Contrary to the suggestion of Petitioner, at p. 24 of its Brief, Respondent has *not* conceded that "the election did not allow the employees to exercise their free choice." (See Tr. 18-21)

ARGUMENT

I.

THE BOARD'S FINDING THAT THE UNION REPRESENTED A MAJORITY OF RESPONDENT'S EMPLOYEES ON JANUARY 15, 1965 IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Board concluded that on January 15 the Union represented 13 of 22 employees in an appropriate bargaining unit. This two-employee majority consisted of four dues-paying members (Moses, Craig, Thompson and Casebolt) and nine employees who had signed Union membership applications [Jochheim, Neal, Metzger, Bowman, Agneta, Harrington, Kopp, David Wanner, and Eugenia (Smith) Wanner]. In so deciding, the Board overruled the Trial Examiner's finding that the application of Jochheim should not be counted.*

It is Respondent's contention that the Board's determination of majority status was erroneous inasmuch as at least three of the applications for membership cannot be considered reliable evidence to support a finding that as of January 15, the Union represented the three employees whose signatures they bore.

While it is true that the validity of a properly executed authorization card or membership application ordinarily will be presumed, there are instances in which the circumstances surrounding the execution of authorization cards require their exclusion. See, *e.g., Conso Fastener Corp.,* 120 NLRB 532, 535 (1958) (Testimony of witness "so vague and inconclusive as to cast serious doubt upon whether she signed her card before" union demand for recognition; *held,* "General Counsel has failed to sustain

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* The Board adopted the rest of the Trial Examiner's findings.

the burden of proving the validity of her card and it must be rejected.")

The first application which Respondent submits was erroneously included by the Board was that of Jochheim.

The Board's determination that Jochheim's application was a valid designation of the Union as bargaining agent on January 15 was a rejection of the Trial Examiner's express holding to the contrary. The application was made on July 31, 1963, nearly a year and one-half before the Union's bargaining request. While noting that Jochheim's action in completing Union membership requirements on August 6, 1965, did lend some support to a presumption of "continued viability" of his application, the Trial Examiner noted that "under all the circumstances I consider his action . . . as being too remote in time to demonstrate his continued adherence to his designation of the Union as collective bargaining representative at the critical date." (R. 25)

In its Brief, the Board concedes that its rule is that bargaining authorizations generally will not be counted if *more than a year old,* but urges that an exception exists where an application was signed during the same organizing campaign as that leading to the request to bargain, citing *Knickerbocker Plastic Co., Inc.,* 104 NLRB 514 (1953), *enforced,* 218 F.2d 917 (9th Cir. 1955); *The Grand Union Co.,* 122 NLRB 589 (1958), and *Safeway Stores, Inc.,* 99 NLRB 48 (1952). The Board concluded that Jochheim's application came within this exception because it was taken during a single organizing campaign which was interrupted by the filing and processing of unfair labor practice charges.

Respondent submits that the record does not support a finding that Jochheim's application was signed during the same organizing campaign as that leading to the

bargaining request. On the contrary, all that the probative evidence shows is that applications were accumulated over the course of several years.* The Board has not only erroneously characterized such activity as a "single organizing drive," but has further erroneously patched such intermittent activity together with a finding that a long hiatus in such "single campaign" occurred because the campaign was interrupted by unfair labor practice proceedings.

In the instant case, Jochheim signed an application on July 31, 1963. There is no affirmative evidence in the record that his application was executed during *any* organizational campaign. The record simply shows that Jochheim voluntarily went to Mason's office on July 31, 1963, and signed an application. (Tr. 89)

The only specific reference to any organizing efforts in 1963 was that made by the Union's International Representative, Prarie, in response to a question by Union counsel about another employee:

> Q (By Mr. Williams) How did you happen to take that authorization card from Mr. Metzger, Mr. Prarie?
>
> A I was assisting the union in a *previous organizational drive that had been started some time in 1963,* as I recall, and I had made an additional trip.

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* The applications bear the following dates: April 4, 1963; July 31, 1963; February 11, 1964; February 12, 1964; October 1, 1964; January 14, 1965. The last-mentioned date is the only one to appear on more than one application.

I think that I was in here the latter part of '63, and in early '64. . . ." (Tr. 372) (Emphasis added)*

Nevertheless, the Board relied upon *Knickerbocker Plastic Co., Inc., supra,* as authority to count Jochheim's card.

In *Knickerbocker* there was an *intensive* organizational campaign which began in about June of 1950 and culminated in an election in September of 1950. The election was lost as a result of the employer's unfair labor practices and was set aside. The campaign actively resumed again in January or February of 1951 and continued until the middle of 1951. Under these particular circumstances, the Trial Examiner found that cards executed in June or July of 1950 were still valid a year later:

> "Nine of these cards were signed in June 1950; of the remaining 3, 2 were signed in July and 1 in September of that year. It will be recalled that this was during the initial stages of the organizational campaign by Machinists which culminated in an election in September 1950. This election was lost by the Union as a result of Respondent's unfair labor practices and the election was later set aside. The campaign resumed in January or February of 1951, as hereinabove described. *Under these circumstances,* the undersigned deems this group of cards to be reasonably current cards signed in support of Machinists during the *same* organizational campaign and properly receivable in evidence, although, as

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* Neither the Trial Examiner nor the Board acknowledged the foregoing testimony of Mr. Prarie. Respondent argued to both that Prarie's testimony describing a "previous organizational drive" with respect to Respondent's employees should be relied upon not only to support the exclusion of Jochheim's application, but also to exclude the applications of Metzger (February 11, 1964) and Bowman (February 12, 1964), neither of which was ever reaffirmed before January 15, 1965.

will appear, some have not been included for other reasons." (104 NLRB at 529-530) (Emphasis added)

Thus in *Knickerbocker,* where the Union's organizational efforts culminated in an election which the Union lost *as a result* of the Employer's proven unfair labor practices, the pre-election and post-election campaigns were constructively deemed a single campaign.

There is nothing in the decision which suggests that if a union unilaterally decides to cease organizational efforts during the period that an unfair labor practice charge is filed, authorizations taken before the cessation will be deemed to have been taken in the "same" organizational effort as may occur later.

Furthermore, in *Knickerbocker* there were proven unfair labor practices. In the instant case, there were not. On March 26, 1964, a charge against Respondent was filed. On June 26, 1964, the Regional Director for Region 21 of the Board approved a settlement of the foregoing charge which Settlement Agreement expressly provided, "DISCLAIMER — By signing this agreement the Employer does not admit any any (*sic*) violation of the Act.*

There is no proof that whatever campaign efforts were going on were interrupted, in a *causal* sense, by the foregoing unproven charges.** Moreover, even if it is assumed

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* The Trial Examiner took judicial notice of the earlier charge and settlement agreement in Case No. 21-CA-5854 for the limited issue of whether the applications of Jochheim, Neal, Metzger and Bowman were taken during a single campaign which was interrupted by unfair labor practice charges. (Tr. 243-250)

**Prarie, whose testimony constitutes that only evidence offered on the issue of the relationship between the alleged unfair labor practices and the cessation of organizational activity, at no time testified that the cessation was *caused* by any acts of Respondent. His testimony reveals no more than that, during the processing of unfair labor practice charges, the Union did not engage in organizational work. (Tr. 370-379)

that the Union's cessation of such efforts amounted to an "interruption," there is *no* evidence in the record that any organizing attempts resumed soon after June 26, 1964. What the record shows is that organizational efforts did not commence again for many months, *not because of the unfair labor practice charge,* but because of the illness of Mason:

> "... I had been ill up until — *I had been off ill from July until about the latter part of October in '64, and it wasn't until after the first of the year that I could get back to the organizational work in Oceanside.* ..." (Tr. 79) (Emphasis added)

There is no evidence in the record that anyone other than Mason engaged in any organizational activity between June 1964 and January 1965. Only one application was executed during the eleven-month period between February 1964 and January of 1965, that of Agneta on October 1, 1964.* The record is barren of any description of the circumstances under which it was executed.

However, on January 14, 1965, some five applications were executed. Thus, if there were ever *any* "intensive" organizing campaign, it was during the period after Mason returned from his illness. To say, as the Board does in its Brief, at p. 26, that an application such as Jochheim's, executed a year and one-half before the Union's demand, should be counted "since the time lapse between signing and bargaining was due to the Company's unfair labor practices. ..." is to absolutely ignore the record.

As Respondent has demonstrated, the *Knickerbocker* rule is not properly applicable to this case so as to characterize the period during which Jochheim signed his appli-

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* G. C. Exh. 15

cation as part of the same campaign which led to the Union's request to bargain. Even if it were, however, Respondent submits that Petitioner has misapplied the *Knickerbocker* decision so as to include Jochheim's application.

The Board in *Knickerbocker* held no more than that two periods of Union organizational activity will be deemed to constitute one organizing campaign when the hiatus is caused by an employer's unfair labor practices. Having decided by the application of that rule that all the authorization cards involved therein were signed during one campaign, the Board then found that those cards met the *two* basic criteria of reliability: (1) they were reasonably current, and (2) they were obtained during the same organizational campaign which culminated in the request to bargain.

The relevance of these criteria is unquestionable. With respect to the age of the cards, the United States Court of Appeals has recently observed that where cards are obtained over a period of time, "there is no assurance that an early signer is still of the same mind on the crucial date when the Union delivers its bargaining demand." *NLRB v. S. S. Logan Packing Co.*, ... F.2d ....., ... L.R.R.M. ..... (4th Cir., decided October 27, 1967), at pp. 8-9 of slip opinion. The importance of the second factor is equally obvious. If the Union should abandon an organizing campaign voluntarily, later resuming its organizing activities and demanding recognition, the reliability of an authorization card obtained prior to the abandonment would be highly suspect even if it had been obtained *within one year* prior to the demand.

Knickerbocker created an exception which applies *only* to this latter factor. Thus, where the cessation of organizational activity is due not to a lack of union enthusiasm

for the task, but to harassment by the employer, it will not be assumed that the commitment to the union expressed in the authorization card has been recanted *if* the cards are *otherwise* reasonably current.

Knickerbocker cannot be read as an exception to the requirement that cards be current, for the cards involved in that case *were,* in the words of the decision, "reasonably current cards." 104 NLRB at 530. In fact, the oldest card in *Knickerbocker* was signed no more than 13 months prior to the bargaining request. 104 NLRB at 529.*

In the instant case, however, an application executed one and one-half years before the demand, as was Jochheim's, is *not* reasonably current. That application was not, therefore, reliable evidence of Jochheim's desire as of the time of the demand to designate the Union as his bargaining representative. The Trial Examiner recognized this, for despite finding, by application of the *Knickerbocker* rule, that Jochheim had signed during the same organizational campaign which led to the January 15 demand, he ruled that Jochheim's application was too stale to be counted. (R. 25) Respondent submits that the Board's contrary determination was erroneous.

The next application which should have been excluded is that of Neal. It was conceded at the hearing before

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* In *Safeway Stores, Inc., supra,* cited also in *Knickerbocker,* 104 NLRB at 530, the bargaining demand was made on August 26, 1950. The Board held that, at that time, the union had a majority of the 29 employees in the appropriate unit. Sixteen of the twenty-one authorization cards had been signed between August 22 and August 26, 1950, and five were dated "in 1949." There is no indication that those five cards were, in fact, more than one year old. And in *The Grand Union Company,* 122 NLRB 589 (1958), where the Board held invalid those cards which had been obtained more than one year before a bargaining demand, it noted that the majority in *Safeway* did not depend upon the 1949 cards. 122 NLRB at 590 n. 1. Therefore, these cases cited at pp. 25-26 of Petitioner's Brief are inapposite.

the Trial Examiner that Neal's application for Union membership "was made long before" any effort to organize Respondent's employees "and for a different purpose." (Tr. 267) Neal had signed an application on April 4, 1963, *before* he was employed by Respondent, in order to secure employment at a San Diego newspaper. (Tr. 91, 262) He did not become a Union member.*

Neal was first employed by Respondent in May of 1964. (Tr. 260) Neal testified that after leaving San Diego he had completely forgotten about the 1963 application until some time *after* the Union's telegram of January 15. (Tr. 263) It was not until "on or about February 8, 1965," according to the Union's secretary, nearly a month *after* the Union's demand for recognition, that Neal's 1963 application was "renewed . . . on an amnesty basis." (Tr. 91-92)**

It is clear from the foregoing that Neal's application was not taken during *any* organizational effort with respect to Respondent's employees. Furthermore, at no time between April 4, 1963, and January 15, 1965 did Neal ever reaffirm his application.***

The finding of the Trial Examiner, adopted by the Board, that "Neal's application for membership was viable when the Union demanded recognition" on Janu-

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* In its Brief at p. 28, the Board states that "Neal's application was executed in April 1963, and he was *then admitted to membership. . . .*" Such statement is not correct and contradicts the Trial Examiner's finding that Neal had not become a member because he had not taken the oath. (R. 25)

**Mr. Ratliff, the Union's secretary, described Neal's application of April 4, 1963 as one which had "laid dormant for a long time." (Tr. 98)

***The Board requires reaffirmation to the Union of authorizations which are not current if they are to be considered valid designations. *The Grand Union Co., supra.* It will be recalled that Jochheim did *not* reaffirm his application prior to January 15.

ary 15 because it was renewed almost a month *later* (R. 25-26) has no basis in precedent or in common sense.

The next application which should have been excluded on the basis that General Counsel did not sustain his burden or proving its validity is that of Eugenia Wanner (who was Eugenia Smith on January 15).

Mrs. Wanner testified that as of the date of an interview with Mr. Braden sometime *after* January 15, 1965 (Tr. 209-210, 212, 333) she had not signed anything:

> "Q (General Counsel) At the time of his interviewing you, had you yet signed an application in the Union?
>
> "A *No.*
>
> "Q It (the interview) was *prior* to the date of your having signed the application which is in evidence here?
>
> "A *Yes.*" (Tr. 210) (Emphasis and parenthetical added)

Mrs. Wanner remained equally firm and certain on cross-examination. (Tr. 213) Her testimony was corroborated by Braden. (Tr. 333)

Notwithstanding this testimony, which was not discredited by the Trial Examiner, the Board adopted a finding that Eugenia had signed her application on January 14, its *typewritten* date. (G. C. Exh. 12) In making this finding, the Trial Examiner noted the testimony of David Wanner who stated that Eugenia had been with him at the time *he* signed an application. (Tr. 200, 201) *However, Wanner did not testify that he saw her sign anything.* The Trial Examiner commented on this as follows:

> "I attach no significance to the fact that David Wanner testified merely that Mrs. Wanner was

present at the Union's headquarters when he signed the application, and did not testify that he saw her sign. David Wanner preceded his wife on the witness stand, hence there was no occasion at that time for the General Counsel to interrogate him regarding Mrs. Wanner's signing." (R. 22 n. 14)

The foregoing is correct as to the sequence of witnesses, but it absolutely ignores the point that once Mrs. Wanner testified clearly and unequivocally that she did not sign an application until some later date, General Counsel did not recall David Wanner in order to try to sustain his burden of proving the validity of her application.

The Trial Examiner also noted that, according to the credited testimony of Mason, Eugenia's application was signed on January 14, 1965. (R. 22) However what Mason said was as follows:

First, in identifying Eugenia's application:

"Exhibit 12, Eugenia G. Smith, January 14, 1965, is correct." (Tr. 81)

Later:

"I believe, to the best of my recollection, on David Wanner — I spoke to him first, and then, if I am not mistaken, he went back and brought, at that time, Eugenia Smith back with him.

"I am not positive on it . . . ." (Tr. 225)

This is not an instance where the Court need be concerned with overturning a Trial Examiner's credibility findings. It is simply a situation where there is considerable doubt as to whether Eugenia Wanner signed an application on January 14, 1965 or at some later date. Because of this doubt, General Counsel did not sustain his burden of proving the validity of the application on the critical date, and the application should not have been

counted according to the Board's own precedents. See, *e.g., Conso Fastener Corp.,* 120 NLRB 532, 535 (1958).

In sum, Respondent submits that there is not substantial evidence in the record to support a finding that the Union represented a majority of Respondent's employees on January 15, 1965. At least three of the applications, Eugenia Wanner's, Neal's, and Jochheim's, should have been excluded by the Board.

If the Union did not represent a majority of Respondent's employees in a combined mechanical department unit, the Board's finding of a Section 8(a)(5) violation was erroneous, and a bargaining order was improper. Accordingly, that portion of the Board's order should not be enforced. *J. P. Stevens & Co. v. NLRB,* 380 F.2d 292 (2d Cir. 1967); *NLRB v. H. W. Elson Bottling Co.,* 379 F.2d 223 (6th Cir. 1967).

II.

NONE OF THE BOARD'S FINDINGS AS TO RESPONDENT'S UNLAWFUL COURSE OF CONDUCT BETWEEN THE TIME OF THE UNION'S DEMAND AND THE ELECTION, UPON WHICH THE BOARD RELIED TO FIND THAT RESPONDENT VIOLATED SECTION 8(a)(5), ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Respondent Was Entitled To A Finding Of Good Faith Doubt As To The Appropriateness Of The Unit Requested By The Union.

In its Brief, Petitioner states that "the alleged doubt concerning the unit is equally demonstrative of the Company's bad faith. The Company *first* questioned the unit almost a month after the Union's demand. . . ." (Brief, p. 33) (Emphasis added)

The record is clearly to the contrary. In Braden's initial reply of January 20 to the Union's January 15 demand, he wrote that the Union ought to seek certification by the Board "in an appropriate collective bargaining unit." (G. C. Exh. 2) The Trial Examiner made no reference to Braden's testimony that, prior to sending that letter, he had discussed his doubts about the appropriateness of a combined mechanical department unit with counsel and had been advised that such unit was not normal.* (Tr. 33, 325) Nor did he refer to the letter which the Union, on February 4, sent in reply to Braden's letter. The following excerpt from the reply makes it clear that the *Union* understood the January 20 letter as raising a doubt as to the appropriateness of the suggested unit:

> "*As to the question of a bargaining unit,* the Union will include. . . ." (G. C. Exh. 3) (Emphasis added)

The Trial Examiner made *no* finding as to whether or not Respondent had a good faith doubt as to the appropriateness of the unit *as of the time* it received the Union's bargaining request. He simply concluded that "*whatever* doubt Respondent may have had as to the appropriateness of any unit suggested by the Union, did

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* As of January 20, then current Board precedents made it clear that an all mechanical department unit combining composing room employees with pressmen or other printing crafts was normally *not* an appropriate unit. See, *e.g., Dinuba Sentinel,* 137 NLRB 1610 (1962). Even in *Garden Island Publishing Co.,* 154 NLRB 697, 698 (1965) which issued six months *after* Braden's reply letter, the Board restated its long standing position that "in the mechanical department of a newspaper, the Board usually finds appropriate separate units of the various crafts," the exception being when neither union nor employer *objects* to a joinder of traditionally separate crafts.

not relieve it of its obligation to bargain with the Union." (R. 26) (Emphasis added)*

It is Respondent's contention that it did have a good faith doubt as to the appropriateness of the requested unit, that it communicated this doubt to the Union on January 20, and that such doubt ought to be considered by this Court along with the other factors hereinafter discussed in determining whether or not there is substantial evidence in the record to support a finding that Respondent did not in good faith refuse to recognize and bargain with the Union.**

B. There Is No Substantial Evidence To Support The Finding That Respondent's Employee Interviews Violated Section 8(a)(1).

The Board determined that the interviews which Braden conducted following receipt of the Union's telegram of January 15 were coercive or reasonably had a tendency to coerce his employees. This finding not only provided a basis for the Board's conclusion that Respondent had thereby violated Section 8(a)(1), but it was also

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* He also stated that since Respondent *later* agreed with the Union in the Agreement For Consent Election that a combined unit was appropriate, Respondent must be held to have waived its objection to such a unit. (R. 19) This later position by Respondent has no bearing on whether or not Respondent could doubt the appropriateness of the requested unit on January 20.

**This Court has recognized implicity that a good faith doubt regarding composition of bargaining units *does* justify a refusal to bargain where that doubt affects the question of whether or not the Union has achieved majority status. *Sakrete of Northern California, Inc. v. NLRB,* 332 F.2d 902, 908 (9th Cir. 1964), *cert. denied,* 379 U.S. 961 (1965). Respondent's doubt regarding the unit was clearly relevant to the majority question since, as will be developed *infra,* it had been informed by a majority of the employees in the composing room, the traditional unit, that they did not wish to be represented by the Union.

used in a unique manner to controvert Respondent's claim that its refusal to bargain was based on a good faith doubt as to the majority status of the Union. The Board adopted the Trial Examiner's finding that Respondent was *estopped* from relying on the answers which the employees gave during the interviews because of the coercive nature of the interviews. (R. 31 n. 29)

If the Court agrees with Respondent that these interviews were lawful, then, of course, Respondent was entitled to rely on such information. In *Briggs IGA Foodliner,* 146 NLRB 443, 446 (1964), the Board held that an employer's interviewing of his employees soon after a union demand was not a violation of the Act. The Board went on to hold that the information acquired by such interviews helped *create* a good faith doubt that the union represented a majority. Respondent submits that the interviews in question were not improper and that the reasoning which led the Board and the Trial Examiner to a contrary conclusion was erroneous.

The Trial Examiner advanced five reasons in support of his determination that the interviews violated Section 8(a)(1): (1) the interviews were not conducted for a "legitimate" purpose since Respondent had already replied to the Union that it doubted whether the Union represented a majority in an appropriate unit; (2) the interviews were formal; (3) Braden demonstrated an anti-Union animus to employees prior to and during the interviews; (4) Braden held out the promise of possible pay raises to several employees during the interviews; and (5) two of the employees lied when asked if they had signed Union cards.

1. The Board Erred In Finding That The Interviews Were Conducted For An Illegal Purpose

The Trial Examiner made *no* finding as to what he considered the purpose of Braden's interviews with his employees to be. What he did state was that since the interviews were to "confirm the doubt" that Respondent had expressed in its letter to the Union, they were not conducted for a legitimate purpose and did not fall under the Board's *Blue Flash** doctrine.** (R. 28)

In *Blue Flash,* the Board held than an employer's individual interviews of employees to determine whether or not they had signed union cards did not violate Section 8(a)(1) of the Act. The Board's rationale was that this interrogation was not coercive in light of the fact that prior to each interview the employer informed his employees that he had received a bargaining demand from the union, that they were not required to answer his questions, that no reprisals would follow if they did, and that his communicated purpose was to determine whether the majority claimed by the union did, in fact, exist. The Trial Examiner conceded that Braden had complied with these *Blue Flash* requirements. (R. 28-29)***

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* *Blue Flash Express, Inc.*, 109 NLRB 591 (1954)

**The three cases relied upon by the Trial Examiner and Petitioner (Brief, pp. 13-14 n. 13) are not in point. In each of them, *P-M Parking System,* 139 NLRB 987 (1962), *Henry I. Siegel Co., Inc.*, 143 NLRB 386 (1963), *enforced,* 328 F.2d 25 (2d Cir. 1964), and *General Electric Co.*, 143 NLRB 926 (1963), there was clear proof of a typical *illegal* purpose for interrogation. For instance, in *Henry I. Siegel Co., Inc.,* employees were quizzed as to the identity of the union ringleader. In none of these three cases did an employer, after utilizing the *Blue Flash* safeguards, *infra,* interrogate employees for the purpose of determining or confirming whether or not a majority had designated a union as collective bargaining representative.

***Braden either showed or told each of the employees whom he interviewed of the Union's demand of January 15 and that he wanted to find out if it was correct. He told them that they did not have to answer and, if they did, they did not have to fear any reprisals.

It is clear that the Trial Examiner's finding that the interviews were not for a legitimate purpose rested on their *timing,* in that they did not occur until after Respondent's first reply letter of January 20.

However, absent proof of an illegal purpose, the fact that Respondent deemed it prudent to confirm an initial expression of doubt should not taint such interviews. An employer should have no less a valid interest in confirming an already stated doubt of majority status than in interrogating to determine whether he can in the first instance fairly claim such a doubt.

Respondent's prudence in this regard proved sound, for in the Union's next letter of February 4 (G. C. Exh. 3), the Union offered for the *first time* to prove its claim of majority status. In its reply of February 11, Respondent told the Union about the interviews and that its rejection of the Union's offer of proof was based on those interviews. (G. C. Exh. 4) Had the results of the interviews been otherwise, Respondent would have been in a position to agree with the Union's claim.

Respondent, therefore, submits that the conclusion of coercion, because of either the lack of purpose* or timing** of the interviews, was erroneous.

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* This Court has repeatedly held that interrogation *per se* is not unlawful. See, *e.g., NLRB v. Sellers,* 346 F.2d 625 (9th Cir. 1965); *Salinas Valley Broadcasting Corp. v. NLRB,* 334 F.2d 604 (9th Cir. 1964); *S. H. Kress & Co. v. NLRB,* 317 F.2d 225 (9th Cir. 1963); *NLRB v. Fullerton Publishing Co.,* 283 F.2d 545 (9th Cir. 1960); *NLRB v. McCatron,* 216 F.2d 212 (9th Cir. 1954) *cert. denied,* 348 U.S. 943 (1955); *Wayside Press v. NLRB,* 206 F.2d 862 (9th Cir. 1953).

**A *delay* in polling employees is not objectionable as far as the Board is concerned. In *Cameo Lingerie, Inc.,* 148 NLRB 535 (1964), notwithstanding the Board's assumption that the union had represented a majority *at the time of its original demand,* the Board refused to find an 8(a)(5) violation even though the employer did not poll his employee until *three months* after such demand was made.

2. The Board Erred In Finding That The Interviews Were Conducted With Coercive Formality.

The Trial Examiner's conclusion that "in *each* instance, the employee was summoned to Braden's office by his foreman" (R. 15, 28) (Emphasis added) is contrary to the record. (See, *e.g.*, Tr. 44.) The more significant fact, however, is that the record is lacking in any evidence which would support, or even suggest, that talking with Braden in his office was, to the employees, a "formal" procedure. On the contrary, the record clearly demonstrates that Braden had a close relationship with most of his employees. (Tr. 52, 53, 346)*

The Trial Examiner reasoned that the very fact that Braden otherwise enjoyed an informal relationship with his employees rendered the procedure followed during the interviews coercive. (R. 28) Respondent submits that this reasoning has no basis either in the record or in logic and therefore the finding of "coercive formality" was erroneous.

3. The Board Erred In Finding That Braden's Statements Reflected An Anti-Union Animus And In Relying On Such Statements To Find That The Interviews Were Coercive.

The Trial Examiner found that "even before the interviews, Braden has (*sic*) already made clear to the employees at the group meeting his opposition to the Union, and this was reiterated in some of the interviews. . . ." (R. 28)

The record discloses that there were at least two meetings, one before the interviews and one at the time of Respondent's filing its RM Petition in March. Several

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* As stated by Braden, "[T]he door was always open, they could all come in. . . . " (Tr. 347)

of the Braden statements relied upon by the Trial Examiner actually occurred at the latter meeting. However, it is Respondent's position that these statements, regardless of when they were made, were protected speech within the meaning of Section 8(c) of the Act.

Insofar as the pre-interview meeting was concerned, the Trial Examiner relied on the testimony of Bowman, Wanner and Salani. Bowman recalled a meeting attended by about a dozen employees and his entire testimony describing what Braden said was as follows:

> "A He just said *he didn't care if anyone was union or not.* He wanted — that he hated to see it come into the shop.
>
> "Q Did he make any further comment at that time?
>
> "A Not that I can remember."
>
> (Tr. 43) (Emphasis added) (See also Tr. 50)

Salani testified similarly. (Tr. 269)

Wanner's testimony was as follows:

> "A Well, Mr. Braden said that he had received a telegram or a letter from the union stating that they felt — or that they had a majority of the people in the composing room and press room, and that they felt they should represent them for negotiating for a union contract, as I recall.
>
> "Q Did he express *his view* as to desirability of the union being recognized?
>
> "A He felt that the Blade-Tribune would be better off without the union." (Tr. 190, 191) (Emphasis added)

The Trial Examiner did not mention the following testimony by employee Hareld:

". . . but I think he did say — *it is entirely up to you — up to us — whichever way we want to go.*" (Tr. 216) (Emphasis added)

The meeting described by witness Messinger, whose testimony was relied upon by the Trial Examiner to help support a conclusion that the interviews were conducted in an atmosphere of coercion, actually occurred *after* the interviews, at or about the time Respondent filed its RM Petition in March:

"Q (Mr. White) Is it your testimony that at some occasion Mr. Braden called the employees together and told them that he had filed a petition with the Board for an election?

"A Yes.

"Q Was that the meeting you were talking about in explaining it to [General Counsel]?

"A Yes, sir, it was. That was the meeting there that I was talking about. That was when they were all there at the meeting. That was when they were all there that he had petitioned the union for an election.

"Q The petition to the National Labor Relations Board?

"A Yes." (Tr. 136, 137)

What Mr. Braden stated at that meeting was described by Messinger as follows:

"A It started out — first of all, he gave us his version and his idea of why an employer should run his own business and that — and the subject was brought up of why there was so many — in fact, I brought the subject up myself of why there was so many different skills in one plant, and Mr. Braden

made the statement that the longer the man had been there and had been with him more years, he should draw more money than a new man, and which isn't true in the plant, but that was his answer to me.

"And also he gave us the idea that he wasn't in favor of the union, but he was going to allow us to vote to decide *which way we wanted to go on it.*

"Q Did he say the employees were free to vote on the union in any way they desired?

"A I couldn't say with truth about that. I couldn't say with truth if he made that statement or not.

"Q You heard him make that statement; did you not?

"A I believe — I believe *he did make the statement that the employees could vote whichever way they wanted to vote.*" (Tr. 137, 138) (Emphasis added)

It would also appear that the meeting referred to by Agneta, and upon which the Trial Examiner relied to help support his conclusion that the interviews were conducted in an atmosphere of coercion, was the same *later* meeting described by Messinger. (Tr. 153) In any event, the statements attributed to Mr. Braden at such meeting were as follows:

"Q (General Counsel) Did Mr. Braden express his views as to the matter at that time?

"A Yes, he did.

"Q What did he say?

"A Well, he said that he felt that it was a family, and everybody was happy, and we — he was always happy working with the employees, and that we didn't need a union in the shop.

"The shop runs fine, he said, that he believed in free enterprise. He explained this a little bit, and he felt that he could run the newspaper better then than the union could run it. I am not sure of the specific words, but he did say that he could run the shop better the way he had been running it for years with the close-knit family of people, and that everybody would progress along with the paper, which is progressive." (Tr. 154)

Based on the foregoing, Respondent submits that General Counsel failed to prove that the interviews with the employees were coercive in character because of any pre-interview statements attributed to Braden.* It is true that Braden stated his personal preference toward operating his business as he saw fit, but at all times he made clear to his employees his respect for their statutory rights under Section 7 of the Act. In this regard, the foregoing testimony of the various employee witnesses was corroborated by Braden. (Tr. 33, 36, 37)

Section 8(c) of the Act provides that "the expressing of any views, argument or opinion, or the dissemination

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* Insofar as the "reiteration" of Braden's "opposition to the Union" *during* the interviews is concerned, the Trial Examiner relied on three statements: first, a statement to Agneta about "dragging people over to the Miramar," which will be discussed *infra;* a question to David Wanner about a "kick . . . in the teeth" before Wanner left; and a statement to Harrington that Braden did not think that the paper needed a union at the time. The question to Wanner occurred after Wanner's statement that he had only joined the Union because he was going to quit shortly and go to Alaska where he understood he had to be in the Union to get a job and that "it was a coincidence, my joining the union and going to Alaska, and the shop being organized." (Tr. 192)

The statement to Harrington, Respondent submits, is a privileged statement of opinion within Section 8(c). Even if it were not, the foregoing statements do not constitute sufficient evidence that all the interviews with thirteen employees were coercive because of Braden's "anti-Union animus."

thereof, whether in written, printed, graphic or visual form, *shall not constitute or be evidence of* an unfair labor practice under any of the provisions of this sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis added)

Respondent submits that the pre-interview statements attributed to Braden, all of which are set forth above, were clearly within the free speech proviso of this section and were improperly relied upon to characterize the employee interviews as coercive and violative of Section 8(a)(1).

Respondent suggests that several circuits have circumvented the clear language of Section 8(c) by reasoning that, while protected employer speech cannot be considered "evidence" of an unfair labor practice, such speech may be considered as "background" in finding the existence of anti-union animus. See *International Union, United A., A. & A. Imp. Wkrs. v. NLRB,* 363 F.2d 702, 707 (D.C. Cir 1966), *cert. denied,* 385 U.S. 973 (1966); *Hendrix Mfg. Co. v. NLRB,* 321 F.2d 100 (5th Cir. 1963); *Flemingsburg Mfg. Co. v. NLRB,* 300 F.2d 182 (6th Cir. 1962). This dubious distinction between "evidence" and "background" information was rejected in *NLRB v. Colvert Dairy Products Co.,* 317 F.2d 44 (10th Cir. 1963), and in *NLRB v. Howard Quarries, Inc.,* 362 F.2d 236 (8th Cir. 1966). In the latter case, the Court of Appeals held that "mere display of anti-union hostility during the course of an organizational campaign is to be expected and does not constitute an unfair labor practice." (362 F.2d at 240) Moreover, the Court held that an employer's speech which does not constitute an unfair labor practice cannot be considered as evidence of another unfair labor practice:

> "The right of free speech guaranteed by the First Amendment and by § 8(c) should not be defeated by narrow or strained construction." (362 F.2d at 240)

This Court has not passed squarely upon this issue, but Respondent reads *NLRB v. Roberts Brothers,* 225 F.2d 58, 60 (9th Cir. 1955), as an indication that this Court will adopt the rule announced in *Colvert Dairy Products, supra.* In *Roberts Brothers,* General Counsel argued that the fact that a concededly privileged speech had been made just before the taking of a private poll rendered the poll coercive because of its subtle psychological effect on the employees. This Court rejected the argument and refused to consider the speech in denying the petition for enforcement of a cease and desist order.

4. The Board Erred In Finding That The Interviews Were Coercive Because Of Remarks To Bowman And Harrington Concerning Pay Raises.

Employee Bowman testified that within a week or two after his interview with Braden, which would have been sometime in February, he received a twenty-cent raise. (Tr. 45)

Employee Harrington testified that he received a fifteen-cent raise shortly after his interview with Braden, which also would have been in February. (Tr. 58)

Contrary to Petitioner's assertion that there was no "independent evidence" as to Respondent's pay raise policy, Respondent submits that the record clearly shows that the foregoing raises were granted in conformity with a theretofore consistently followed practice of granting raises in the press-stereo department, in which Bowman and Harrington were employed, at six-month intervals. This practice was described by Braden (Tr. 334) and it was corroborated by both Bowman and Har-

rington. (Tr. 52, 63, 64) Harrington testified that he and the other press room employees had received their last raises "around August" of 1964, which was about six months prior to the February, 1965, raises. (Tr. 63) He further stated that the other employees in his department received the February raise at the same time that he did. (Tr. 59, 60) There was no evidence as to the amounts of such other raises or how they compared with Bowman's or Harrington's.

There was no finding, much less a contention made, that the *granting* of the pay raises violated the Act.*

The foregoing evidence was not acknowledged in the decision of the Trial Examiner, who simply found support for his finding of promises of benefit in the fact that Braden had told Harrington and Bowman that there might be some problem in granting the periodic raises, but that he would see what he could do. (Tr. 44, 65, 77)** These statements to Bowman and Harrington during the interviews were made because Braden was uncertain whether he could give the raises in light of the Union situation.*** He later consulted his attorney

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* The Board has consistently refused to find that the granting of wage increases in conformity with established past practice during an organizational campaign constitutes a violation of the Act. *Sheboygan Sausage Co., Inc.,* 156 NLRB 1490 (1966); *Higgins Industries, Inc.,* 150 NLRB 106 (1964); *Phillips Mfg. Co.,* 148 NLRB 1420 (1964); *Charlotte Union Bus Station, Inc.,* 135 NLRB 228 (1962).

Conversely, the *withholding* of customary wage increases has been held to constitute an "inherently coercive" unfair labor practice. *Federation of Union Representatives v. NLRB,* 339 F.2d 126, 129-130 (2d Cir. 1964).

**There is nothing in the record which suggests the granting of raises was conditioned on employees' staying away from the Union or voting against the Union in a future election. Furthermore, at the time the raises were granted they were not accompanied by any reference to the Union. (Tr. 45)

***That Braden's concern was not unfounded is manifest from the Trial Examiner's decision.

on the matter, and was advised that, because of past practice, the granting of the usual raises should be all right. (Tr. 335)

Respondent emphasizes that the Board did not find that the references to or actual granting of the raises to Bowman or Harrington were violative of Section 8(a)(1). Respondent therefore submits that the innocuous references by Braden to pay raises were erroneously relied upon as a factor to support a finding that the interviews were coercive.

5. The Board Erred In Finding That Two Employees Lied During The Interviews, Or, In Any Event, That The Interviews Were Thereby Rendered Coercive.

The Trial Examiner found that the coercive nature of the interviews was demonstrated by the fact that Harrington and Agneta replied in the negative when asked by Braden whether they had signed Union cards, although both had signed applications. The inference drawn from that finding was that these employees were afraid to admit the truth.

Insofar as Harrington is concerned, when he was asked whether he had signed a card, he responded in the negative, not because of fear, but because he had *not* signed a *card*:

> "A . . . and he asked me if I had signed a card saying anything to do with them, and I said no, I hadn't signed a card.
>
> "Q Had you signed a card?
>
> "A *No. I signed a piece of paper.*
>
> "Q It was another form? It was an application form, in letter form?

"A Not necessarily letter form.

"Q It was a large printed application form?

"A Yes." (Tr. 57) (Emphasis added) (See also, Tr. 62 and G. C. Exh. 9)

Agneta's credited testimony that he had denied signing a Union card (Tr. 162) was contradicted by Braden. (Tr. 331) Respondent submits that the denial was completely inconsistent with Agneta's answer to a previous question:

"Q In the course of this conversation with Mr. Braden on this individual interview, apart from the statement which you have described, was there any direct inquiry made of you — directly concerning your affiliation with the union?

"I mean, on the part of Mr. Braden?

"Did Mr. Braden make such an inquiry of you?

"A Why, *I don't think it was necessary before the conversation was over. He pretty much knew.*" (Tr. 162) (Emphasis added)

Furthermore, Respondent submits that Agneta's denial was inherently unbelievable, inasmuch as it followed testimony concerning his "extensive" recitation to Braden of all his "reasons for wanting the shop to become a union shop." (Tr. 156-162). If Agneta had in fact denied signing a Union authorization card, it certainly would have been to Braden's advantage to *confirm* such denial, inasmuch as this would have further bolstered his claim of a good faith doubt as to the existence of the Union's claimed majority.

In any event, even if the findings that Harrington and Agneta had lied during the interviews were supported by the record, that factor would not necessitate a determination that the interviews were coercive. See, *e.g.*,

Bon-R Reproductions, Inc. v. NLRB, 309 F.2d 898 (2d Cir. 1962)*; *NLRB v. Firedoor Corp. of America,* 291 F.2d 328 (2d Cir. 1961).

6. Assuming Arguendo That One Interview Violated Section 8(a)(1), Such Finding Would Not Be A Sufficient Basis Upon Which to Conclude That All The Other Interviews Were Unlawful.

At the time the interviews condemned by the Trial Examiner were conducted, the Board required, in order to uphold the validity of such interviews, that the employer "communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis. . . ." *Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964), *enforcement denied,* 344 F.2d 617 (8th Cir. 1965). The Board conceded that Braden conducted the interviews in accordance with those requirements.

Respondent submits that it is only with respect to the interview of employee Agneta that the record may be said to contain any substantial evidence of coercion.**

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* In *Bon-R Reproductions, Inc. v. NLRB,* the Court held that the interrogations did not constitute an unfair labor practice despite the fact that the interviews were conducted by the president in his office, at least one employee lied during the interrogation, and colorably coercive remarks were made in at least one interrogation. The Court emphasized that, as in the instant case, there had been no threats or promises of benefits made during the short interrogation and that the employees had been told the purpose of the interrogations and that no reprisals would follow.

**The cases cited by Petitioner in support of its contention that inquiries as to union sympathy are necessarily coercive (Brief, p. 12) are clearly distinguishable. *NLRB v. West Coast Casket Co.,* 205 F.2d 902 (9th Cir. 1953), involved interviews which were *not* conducted in accordance with *Blue Flash* requirements. *NLRB v. Essex Wire Corp.,* 245 F.2d 589 (9th Cir. 1957) and *NLRB v. California Compress Company,* 274 F.2d 104 (9th Cir. 1959), neither of which presented a situation in which employee interviews were conducted, are patently inapplicable.

Even Agneta admitted, however, that Braden had advised him prior to the interview that he did not have to answer any questions that were asked (Tr. 182) and that he did not have to fear any reprisal if he did answer any questions. (Tr. 182)

Agneta confirmed that he spent a great part of the interview (Tr. 158, 331) volunteering grievances to Braden. (Tr. 156, 157-162) Agneta apparently attempted to taint the interview by attributing to Braden several questions or statements which would suggest that Braden acted unlawfully. Thus, in one instance, Agneta testified that Braden asked him about "dragging people over to the Miramar with the union men that was there. . . ." (Tr. 156) His recollection of such inquiry was admittedly uncertain. (Tr. 156) Furthermore, on cross-examination, Agneta blunted any implication that such remarks may have raised by stating specifically that Braden did *not* ask him about any other employee. (Tr. 182)

The record discloses that what began as an interview of Agneta became an extended grievance session with an admitted Union sympathizer. Agneta presented to Braden his views as to the benefits expected from unionization and he was subject to no restraints on or circumscription of his freedom of expression. Respondent submits that the very fact that Agneta was obviously *not* intimidated may provide sufficient basis for overturning the Trial Examiner's conclusion that the particular interview was coercive. See *NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d 803, 806 (1st Cir. 1964).

In any event, even if the Agneta interview did involve a violation of Section 8(a)(1), it is clear from the record that that interview was not representative of any of the other employee interviews. Therefore, it should not serve as the basis for even a cease and desist order, much less as a predicate for a finding that Respondent in bad faith

declined to recognize the Union. *Milwaukee Electric Tool Corp.*, 110 NLRB 977, 980 (1954); *Gazette Publishing Co.*, 101 NLRB 1694, 1731 (1952).

C. The Board Erred In Finding That Although Respondent May Have Had Reason To Believe That A Majority Of His Employees Had Not Designated The Union As Collective Bargaining Representative, Respondent Was Not Entitled To Rely On Such Information.

The Board held that Respondent was not entitled to rely on the answers which the employees gave during the interviews because of the coercive nature of Braden's interrogation.

If the Court agrees with Respondent that there is not substantial evidence to prove that such interviews were unlawful, then of course Respondent *is* entitled to rely on such information. *Briggs IGA Foodliner, supra.*

Braden testified that at the time of the interviews, he had considered that there were about 22 employees working in the mechanical departments, 18 in the composing room and 4 in the press-stereo department. (Tr. p. 326) Of these 22, Braden had reason to believe that 12 employees [Wells (Tr. 331), Hareld (Tr. 220, 331), Messinger (Tr. 139, 141, 333), Metzger (Tr. 332), Neal (Tr. 262, 332), Salani (Tr. 269, 332), David Wanner (Tr. 192, 198, 332), Wetzel (Tr. 332-333), Wilson (Tr. 333), Schultz (Tr. 333), Harrington (Tr. 62, 333), and Eugenia Wanner (Tr. 213, 333)], or 11, if Wells is excluded,* either had not designated the Union to represent them or did not want the Union to represent them. Of these 11 or 12, all but 2 — Schultz and Harrington — were composing room em-

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* Wells' status was an issue before the Trial Examiner, who concluded that he was a supervisor.

ployees. Based on these interviews, Respondent had reason to believe that 9 or 10 composing room employees and 2 press-stereo department employees did not wish to be represented by the Union.

D. There Is No Substantial Evidence To Support The Finding That Changing Agneta's Work Schedule Violated Section 8(a)(1).

Respondent contended vigorously before the Board and still contends that it was error to allow an amendment to the Complaint herein on December 14, 1965, over Respondent's objection, which amendment alleged unlawful conduct toward employee Agneta during April, 1965. The original charge contained similar allegations involving Agneta and they had previously been withdrawn by the Union. (Tr. 130) However, Respondent's objection that such amendment was barred by the six-month statute of limitations contained in Section 10(b) of the Act was overruled and Respondent had no practical choice except to litigate the amendment. (Tr. 132)*

However, even if evidence in support of the amendment was properly received, it was not sufficient to support the conclusion that Respondent's action in altering Agneta's work schedule violated Section 8(a)(1).

The Trial Examiner credited testimony of employee Messinger that Wells, Respondent's foreman, had told him that he was going to "get rid of Agneta" after the election, and that Wells later showed him a work schedule and said that "he was sure Agneta wouldn't stay there

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* *NLRB v. Osbrink,* 218 F.2d 341, 345 (9th Cir. 1954), cited by Petitioner at p. 20 of its Brief, did not involve a situation where a charge, once withdrawn, was subsequently revived by amending a complaint. *Frito Co. v. NLRB,* 330 F.2d 458 (9th Cir. 1964), also cited, involved an amendment to conform to proof, where the proof had been admitted *without* objection.

after he saw the schedule." (Tr. 129, 130) Wells had denied such statements. (Tr. 316)

The Trial Examiner concluded that Respondent had a two-fold motive toward Agneta: to rid itself of a Union supporter and to set an example for other employees. (R. 31) However, there is no evidence in the record which tends to prove that Wells knew or ought to have known of Agneta's Union sympathies.* Even according to Messinger's credited version, Wells did not say he was going to get rid of Agneta *because* Agneta was a Union adherent, nor did Wells otherwise refer to the Union.** As the Court has stated:

> "An unlawful intent is not lightly to be inferred. It cannot rest on remote or speculative evidence." *Salinas Valley Broadcasting Corp. v. NLRB*, 334 F.2d 604, 613 (9th Cir. 1964).

On the contrary, it is clear that Wells considered Agneta to be an unsatisfactory employee. (Tr. 142, 299)

Prior to the schedule change, which affected a number of employees *other* than just Agneta, Agneta had been

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* Petitioner's characterization of Agneta as "the Union's leading supporter," at p. 37 of its Brief, is completely lacking of support in the record.

**At p. 18 of its Brief, Petitioner cites *NLRB v. Globe Products Corp.*, 322 F.2d 694, 696 (4th Cir. 1963), and *NLRB v. Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958), as authority for Wells' statement being an "outright confession" of unlawful conduct. The utterances in those cases clearly demonstrated a casual relationship to Union activity. *Ferguson*: "Well, . . . I understand that Mr. Ferguson fired everybody that signed a union card . . . he was letting everybody go that had signed a union card. . . . I believe I told you and everybody I hired that Mr. Ferguson didn't go for the union . . . and that before he would go union he would close the gate and lock the trucks up and . . . go somewhere else and start over." (257 F.2d at 91) *Globe Products*: "I am afraid I am going to have to let you two go, because we don't like the idea of our employees fooling around with the union. . . . We are going to make examples of you. . . ." (322 F.2d at 695)

working a night shift (3 P.M. to 11 P.M.) on Monday, Tuesday, Wednesday, Friday and Saturday. (Tr. 314) After the change, Agneta's schedule was the day shift (7 A.M. to 3 P.M.) on Monday, Wednesday and Friday, the night shift on Thursday (3 P.M. to 11 P.M.), and a short shift from 10 A.M. on Saturday. (G. C. Exh. 20; Tr. 169, 170) The alleged oppressiveness of the schedule lay in the fact that on Thursday evening each week, Agneta would not leave work until 11 P.M. and would have to return for work at 7 A.M. the following Friday morning. (Tr. 144, 172) This type of shift is known in the newspaper industry as "doubling back." (Tr. 309)

The reasons for the change were explained by Wells:

"A In the case of the operators, it was a new man coming on.

"Q Who was that?

"A That would be Vincent Diedel, so it was more of the placing, rather than a change, to have him on a shift.

"Q All right.

"A In the case of Ray Craig, again, we were gaining a new man, a new operator on Saturday, so his Saturday was changed—his shift on Saturday—slightly to cover the work flow on that day a little better.

"Ed Agneta—let's see . . . Also, there was another new employee at that time, Lou Calpini.

"Q Is that the same person that is known as Sylvio Calpini?

"A Sylvio L. Calpini.

"I placed him on nights, and brought Agneta over to a day shift, *as much as possible,* so Agneta could

work with Paul Jones to see if we *couldn't make a printer out of him.*" (Tr. 313) (Emphasis added)

Before the change was actually made, Wells explained to Agneta that one of the reasons for the new schedule was to permit Agneta to work as much as possible with Paul Jones, an experienced journeyman compositor. (Tr. 315, 316) This was admitted by Agneta, (Tr. 168) and Jones confirmed that Wells had explained to him, also, the reason for the change in Agneta's schedule. (Tr. 299) Jones concurred in Wells' opinion that Agneta was only an "apprentice" printer, (Tr. 307) and even *Messinger* admitted having heard Wells express this opinion. (Tr. 142)

In light of the fact that Agneta actually worked only *one* "doubling back" shift before he quit, (Tr. 166, 167, 315) his claim of physical exhaustion was inherently incredible:

"— you can't work in these hours every day, and definitely wake up and go to bed, and you — consequently, I missed a lot of sleep.

"Q You found yourself unusually drowsy?

"A Tired on the job, and on two occasions, had a small piece of cast pop out of my fingers when trimming them on the saw, which scared me." (Tr. 171, 172)

"Q Did the increased hazard have anything to do with quitting when you did?

"A Yes, it had quite a bit do with it, except that I didn't quite specifically quit.

"I wasn't specifically fired. *I just could not show up to work. . . .*" (Tr. 172) (Emphasis added)

The Trial Examiner, however, apparently placed considerable reliance on Jones' testimony that a "doubling back" schedule was not "particularly helpful in the training of an apprentice." (R. 30) This, however, was irrelevant. Respondent has never contended that "doubling back" is itself a useful training experience. It was simply an unavoidable result of Respondent's efforts to enable Agneta to work under Jones' supervision "as much as possible." (Tr. 313)

In *NLRB v. Isis Plumbing & Heating Co.*, 322 F.2d 913, 922 (9th Cir. 1963), this Court declared that:

> "The entire record must be viewed in context with the established principle of law that an employer may discharge an employee for good cause, or bad cause, or no cause at all, unless the real motivating purpose is to do that which . . . the Act forbids."

Respondent urges that the record, considered as a whole, compels the determination that the change in Agneta's work schedule was occasioned by Respondent's desire to accommodate several new and experienced employees, as well as to have Agneta work as much as possible with an experienced journeyman.

E. There Is No Substantial Evidence To Support The Finding That Respondent's Pre-Election Luncheon Meetings With Employees Violated Section 8(a)(1).

The Trial Examiner found that Braden's action in taking most of Respondent's employees to lunch prior to the election constituted a violation of Section 8(a)(1) of the Act which in turn provided evidence of Braden's lack of good faith in refusing to recognize the Union. The Trial Examiner conceded (R. 30) that these luncheons, in

and of themselves, were *in no way objectionable.** The objectionable aspects which he found were "Braden's admitted questioning of the employees as to 'what they thought of the Union,' coupled with his reference to Bowman of a pay raise and his statement to David Wanner and Metzger of a possible pension plan, *particularly when considered in the light of Respondent's other unfair labor practices. . . .*" (R. 30) (Emphasis added)

The lack of substantial evidence to support the "other unfair labor practices" has already been discussed. The other objectionable factors set forth above are equally deficient in their support in the record.

First, insofar as "questioning" of employees is concerned, the record shows the following: Braden testified that, after consulting with counsel, he decided to express his opinions and views concerning the forthcoming election at a series of luncheon meetings with his employees. (Tr. 344, 345)

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* That Braden did compaign against the Union prior to the election in no way detracts from his claim of a good faith doubt that the Union at the time of its demand represented a majority of his employees. An employer might well have a bona fide doubt that the Union has achieved majority status at the time of the demand and at the same time, believe that the development of a majority is sufficiently possible that a campaign prior to the election is required. There should certainly be a distinction between efforts to dissipate an existing Union majority and a pre-election campaign to prevent the aggregation of a *possible* Union majority. The United States Court of Appeals for the Seventh Circuit has recognized that pre-election campaigning is not inconsistent with a good faith doubt as to a union's majority status:

> ". . . [i]t is not possible to draw from this the sole inference that [the employer] had no good faith doubt of the union's majority. It is equally inferable that [the employer] was simply concerned and did not like the union organizational drive, perhaps fearing the development of a union majority."
>
> *Wausau Steel Corp. v. NLRB,* 377 F.2d 369, 372 (7th Cir. 1967).

"I have lunched with people from the Blade-Tribune before and since, and I have had coffee breaks with them, but coffee breaks are more difficult and shorter, and when I am in town for an hour or so for lunch, it seemed the reasonable way to do it, and so I determined that my campaign to express my point of view, was to ask individual employees to go to lunch with me.

"I did this over a period of a couple of weeks asking sometimes one, and sometimes two or three, I think on one occasion four employees to go to lunch with me, at the Miramar, and during the course of these lunches, I talked with them about the forthcoming election, and I expressed what my opinions were." (Tr. 345)

". . . I also asked them or nearly always asked them if they thought that there were good reasons why we ought to join the union, and expressed to them my point of view.

"I want to listen, and maybe they could give me some good argument. Some of them did." (Tr. 347)

Five other witnesses testified about the luncheons: Bowman stated that, during the luncheon to which he was invited, Braden "never said a word" about the Union. (Tr. 47) David Wanner testified that he and Metzger were invited to lunch and that the only question asked of them by Braden was "our opinion as to the outcome of the election, how it will turn out." (Tr. 194) Wanner further testified that Braden did not ask any questions about individual employees nor about how any individual employee might vote. (Tr. 198) Eugenia Wanner testified that she and another employee were invited to lunch and that during the course of the luncheon Braden asked them "how we thought the outcome was going to be in the election." (Tr. 211) She also testified that Braden did not

ask any questions about individual employees. (Tr. 214) Hareld testified that he volunteered to Braden that the election would be close, (Tr. 220) but that Braden never asked any questions about any other employees. (Tr. 221) Salani testified that, at the luncheon which he attended, the only question which Braden asked was "What is going on?" (Tr. 273) Salani assumed that Braden was referring to the Union, and he volunteered a personal opinion. (Tr. 271, 272, 273)

The record reveals, therefore, that at some luncheons the Union was not mentioned at all. Obviously, no unlawful interrogation was established as to these.

At most of the luncheons, Braden simply presented his views and opinions about the forthcoming election. There was no evidence contradicting Braden's testimony in this regard and such expressions of opinion should be held to be clearly within the purview of Section 8(c).

During a few luncheons Braden asked employees how they thought the election would go, but in no case did he inquire how they or any other employees would vote.

In several instances, although no employee so testified, Braden admittedly asked employees whether "there were

good reasons why we ought to join the union. . . ." (Tr. 347)*

There is no evidence that these casual and perfunctory inquiries by Braden were pursued in any way or were made for any purpose other than as general conversation.

There is no evidence that Braden used the luncheons in order to conduct a "systematic inquiry and effort to ascertain the extent to which employees in the unit were disclosing support for the Union, and had membership therein," as had been charged in Paragraph 12 of the Complaint herein. [G. C. Exh. 1(c)]**

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* The Board has heretofore approved inquiries strikingly similar to those made by Braden, and has held them to be not in violation of Section 8(a)(1). In *Augusta Bedding Co.,* 93 NLRB 211 (1951), the employer's question, "What good [are you] going to get out of the Union?" was held to be an argumentative question which indicated the employer's views and was therefore protected by the free speech provisions of Section 8(c). 93 NLRB at 220-221.

In *Milwaukee Electric Tool Corp.,* 110 NLRB 977, 980 (1954), the Board held that an employer's questioning of employees as to whether they personally thought a union was needed and if they thought other employees needed a union was merely argumentative, and not violative of Section 8(a)(1).

In *Lanthier Machine Works,* 116 NLRB 1029, 1037 (1956), the Board approved a finding that a supervisor's inquiry of an employee as to "how the Union was going" was not violative of Section 8(a)(1), but was rather a casual and perfunctory inquiry.

**Taken as a whole, the inquiries occuring during the luncheon meetings were as unobjectionable as those upheld by the Board in *Howard Aero, Inc.,* 119 NLRB 1531, 1533-1534 (1958):

> "As for the conversations between (two employees) and their supervisors, the only interrogation was the question to (employee A) by (his supervisor) as to what (such employee) thought of the Union. In substance, the conversations between (the other supervisor) and (employee B) were merely *discussions over the pros and cons of unionism, and cannot be construed as interrogation.* . . .

Insofar as the "reference to Bowman of a pay raise" is concerned, Bowman testified as follows:

"Q (General Counsel) At this time what statements did (Mr. Braden) make concerning the union or the forthcoming election?

"A He never said a word.

"Q Did he, at that time, make reference to the wage increase that you would receive?

"A Not that I remember." (Tr. 46, 47)

"Q (Counsel for Intervenor) Did he make any reference directly or indirectly with regard to the increase you would receive?

"MR. WHITE: Objection. The question has been asked and answered.

"MR. WILLIAMS: Not with reference to this scope.

"TRIAL EXAMINER: Do you mean with regard to this luncheon?

"MR. WILLIAMS: Yes.

"TRIAL EXAMINER: He was asked if anything was said about the union or election at the luncheon, and he answered in the negative.

"Do you want to know if there were any references made directly or indirectly about the increase of wages?

". . . the question directed to (employee A) merely called for an *opinion about the Union; . . .* In these circumstances, we find that these questions did not reasonably tend to restrain or interfere with employees in the exercise of their rights under the Act, and that the Respondent did not violate the Act thereby." 119 NLRB at 1533-1534. (Emphasis and parentheticals added.)

"MR. WILLIAMS: Yes.

"TRIAL EXAMINER: All right. I will permit that.

"Do you remember the question?

"THE WITNESS: Yes. Yes, there was."* (Tr. 49) (Emphasis added)

The latter vague answer to a vague and ambiguous question (which was seemingly contradictory to an earlier answer given to General Counsel) constitutes the "substantial evidence" upon which a finding of an unlawful reference to a pay raise was made.

The third objectionable feature associated with *all* of the luncheon meetings was a reference — at *one* luncheon with *two* employees — concerning a pension plan. Respondent offers for the Court's review the entire record relating to this finding:

"Q (General Counsel) Did he make reference to a pension plan?

"A (David Wanner) He made reference to either a pension plan or an insurance plan.

"Q What was said in that respect?

"A He said that he thought that it would be possible in the future for the employees of the Blade-Tribune — I believe he stated — to work out a pension plan.

"Q Did he compare that with any other plan? Specifically, did he make reference to the ITU pension plan?

"A Not specifically no. I believe he said, as good as they have got, or something" (Tr. 194, 195)

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* It will be recalled that Bowman received a raise in February.

". . .

"Q (Mr. White) This question of pension or insurance plan, do you recall how that subject first came up, or how it — who brought it up?

"A (David Wanner) No, I don't.

"Q Did Mr. Metzger first bring that up?

"A *He could have.*

"Q In that conversation, . . . did he say, as best you can recall, whether or not there might be one in the future, *depending on how the election came out?*

"A I don't believe so." (Tr. 198, 199)

". . .

"Q (General Counsel) As best as you recall, what was his reference to the pension plan? How did he explain himself with respect to this plan, at that luncheon meeting?

"A He had nothing specific, nothing definite about it. He seemed to be open minded favorably toward it.

"Q This is not in response to my question. You say that he provided no specific detail of the plan, but what did he say might be done about such a plan, as you recall?

"A Well, he didn't — his statement, or his comment on this did not go into the implimenting [sic] of a plan, or a plan in itself. It was that we might in the near future work up a pension plan." (Tr. 199)

The foregoing reference by Braden to a pension plan was obviously casual and vague. There was certainly no

promise and no conditioning of the implementation of a plan on the outcome of the election.

In sum, it is manifestly clear from the foregoing review of evidence that General Counsel did not sustain his burden of proving that, by its conduct during the pre-election luncheons, Respondent violated Section 8(a)(1) of the Act and the Board's findings of fact with respect to the illegality of the luncheon meetings are not supported by substantial evidence.

III.

THE BOARD'S BARGAINING REMEDY SHOULD NOT BE ENFORCED SINCE THE RECORD FAILS TO REVEAL A COURSE OF CONDUCT INVOLVING SUBSTANTIAL UNFAIR LABOR PRACTICES CALCULATED TO DISSIPATE UNION SUPPORT OR WHICH MANIFESTS AN EARLIER REFUSAL TO RECOGNIZE THE UNION.

The major premise of the Trial Examiner's and Board's conclusion that Respondent had violated Section 8(a)(5) was the determination that Respondent had committed other unfair labor practices — the alleged 8(a)(1) violations — which "began immediately after the Union's request for recognition and continued until 2 days before the election." (R. 31-32)

As Respondent has demonstrated, the record as a whole does not contain substantial evidence to support such a conclusion.

Petitioner, of course, asserts that the Board's determinations must remain unmolested because they were within the Board's competence as the "primary finder of fact."

That the frail fabric woven by the Trial Examiner and accepted by the Board can be characterized as a finding of

fact ought not to be, in itself, sufficient to compel the upholding thereof. Nor is such a result dictated by any limitations imposed upon this Court's scope of review by Section 10(e) of the Act. As stated in *Joy Silk Mills v. NLRB*:*

> "What [Section 10(e)] was intended to do was insure that in the fringe or borderline case, where the evidence affords but a tenuous foundation for the Board's findings, the Court of Appeals would scrutinize the entire record with care, and be at liberty, where there is not 'substantial evidence,' to modify or set aside the Board's findings."

Assuming *arguendo* that this Court should conclude that Respondent violated Section 8(a)(1) with respect to Agneta or at some point during the luncheon meetings, such violations would not be of the character or degree necessary to support a determination that Respondent had earlier refused to bargain in good faith or engaged in an unlawful campaign to dissipate Union support.

The mere fact that there have been underlying 8(a)(1) violations does not permit a "mechanical finding of intent to dissipate a union's majority." *NLRB v. Mid-West Towel & Linen Service, Inc.*, 339 F.2d 958, 963 (7th Cir. 1964). See also, *Montgomery Ward & Co. v. NLRB*, 377 F.2d 452 (6th Cir. 1967); *Edward Fields, Inc. v. NLRB*, 325 F.2d 754 (2d Cir. 1963).

Respondent urges this Court to consider what the Board itself has stated about the relationship between 8(a)(1) violations and resultant findings of an unlawful refusal to bargain. In *Aaron Brothers Co. of California*, 158 NLRB 1077, 1079 (1966) the Board declared:

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* 185 F.2d 732, 738 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

"Whether an employer is acting in good or bad faith in questioning the union's majority is a determination which of necessity must be made in the light of all the relevant facts of the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct. Where a company has engaged in substantial unfair labor practices calculated to dissipate union support, the Board, with the courts' approval, has concluded that employer insistence on an election was not motivated by a good-faith doubt of the union's majority, but rather by a rejection of the collective-bargaining principle or by a desire to gain time within which to undermine the union. However, *this does not mean that any employer conduct found violative of Section 8(a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding.* For instance, where an employer's unfair labor practices are not of such a character as to reflect a purpose to evade an obligation to bargain, the Board will not draw an inference of bad faith." (Footnotes omitted) (Emphasis added)

On November 1, 1967, in *National Cash Register Co.*, 167 NLRB No. 153 (1967), the Board reemphasized what it had earlier said in *Aaron Brothers*:

"The Board's test for determining good-faith doubt of a union's majority is whether the employer has engaged in *substantial* unfair labor practices

calculated to dissipate union support." (Slip opinion, p. 2) (Emphasis added)*

The evidence regarding Respondent's conduct is certainly not such as to lead to no other conclusion but that Respondent's refusal to recognize the Union was based upon its rejection of the principle of collective bargaining or upon its desire for time within which to undermine the Union.

On the contrary, the record reveals the following facts which militate directly against such a conclusion:

1. At the time of the Union's demand, Respondent had and expressed a good faith doubt as to the appropriateness of the bargaining unit requested by the Union.

2. Respondent was advised by a majority of its employees that they had not authorized the Union or did not

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* The following are representative of instances in which the Board has held that proof of 8(a)(1) violations did not suffice to support a finding of an 8(a)(5) refusal to bargain: *Strydel Inc.*, 156 NLRB 1185 (1966) [employer violated 8(a)(1) by threatening to impose layoffs and more onerous working conditions in the event of union organization]; *Harvard Coated Products Co.*, 156 NLRB 162 (1965) [employer violated 8(a)(1) by threatening loss of business if union came in and by promising an employee a supervisory position if the union lost the election]; *Clermont's, Inc.*, 154 NLRB 1397 (1965) [employer coerced employees in violation of 8(a)(1) via speeches, statements and surveillance]; *Hammond & Irving, Inc.*, 154 NLRB 1071 (1965) [employer unlawfully questioned employees and actually requested some of them to vote against union in election, thereby violating 8(a)(1)]; *Cameo Lingerie, Inc.*, 148 NLRB 535 (1964) [employer violated 8(a)(1) by threatening reprisals against employees if they selected the union as bargaining representative].

want the Union to represent them. This fact was not controverted.*

3. From the outset, Respondent urged the Union to seek an election and it advised the Union that it was willing to enter into a consent election agreement.

4. Respondent filed a representation petition after the Union had failed to do so, and thereafter entered into an Agreement for Consent Election.

5. Respondent consistently advised its employees that whether or not they wanted the Union to represent them was a matter for their decision.

In sum, there is not substantial evidence on the record as a whole to support a finding that Respondent was guilty of the kind of deliberate, egregious conduct which evidences a bad faith refusal to bargain. Isolated or minimal 8(a)(1) violations fall short of demonstrating such a course of conduct in violation of Section 8(a)(5) and are therefore insufficient to support a bargaining order. *Edward Fields, Inc. v. NLRB, supra,* 325 F.2d 754 (2d Cir. 1963); *NLRB v. Dan River Mills, Inc., supra,* 274 F.2d 381 (5th Cir. 1960).

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* Even under its *own* findings, the Board seems to have ignored the *narrowness* of the Union's majority. This has not gone unnoticed in the courts, however.

In rejecting a claim that an employer had no good faith doubt of the existence of a majority, the United States Court of Appeals for the Sixth Circuit made the following observation:

"Even if the 30 signed authorization cards had been submitted to him, he might well have entertained a good faith doubt as to the validity of a sufficient number of the cards to constitute a majority, *especially in the light of the slender majority ultimately found by the Board.*" *Pizza Products Corp. v. NLRB,* 369 F.2d 431, 438 (6th Cir. 1966) (Emphasis added).

See also, *NLRB v. Dan River Mills, Inc.,* 274 F.2d 381 386 (5th Cir. 1960).

CONCLUSION

On the basis of the foregoing, enforcement of the Board's order against Respondent should be denied.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with these rules.

DAVID A. MARION